IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No 73-1231

LINDEN LUMBER DIVISION, SUMMER & CO.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

TRUCK DRIVERS UNION LOCAL NO. 413, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER LINDEN LUMBER DIVISION, SUMMER & CO.

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I.

INTRODUCTORY STATEMENT

In order to resolve the question left unanswered by *N. L. R. B.* v. *Gissel Packing Company*, 395 U. S. 575, 595 and n. 18 (1969), *viz.*, "whether a bargaining order is ever appropriate in cases where there is no interference with the election processes," three separate positions have been presented to this Court. The first, that adopted by the Board pursuant to its expertise and

broad discretion in administering the Labor Act (*Gissel*, 395 U. S. at n. 32; *N. L. R. B.* v. *Seven-Up Bottling Co.*, 344 U. S. 344 (1953)), and advanced here by both the Board and Linden, is that, unless an employer has voluntarily agreed to resolve a union's claim of majority by another permissible means, he may lawfully insist that the union's status be determined by an election—that, in these circumstances, a bargaining order would never be appropriate. The second contention, the view of the court below, is that a bargaining order would be an appropriate remedy in such a case where the employer fails to affirmatively "evidence good faith" and resolve the union's majority claim, if voluntary recognition is declined, by filing an immediate election petition under Section 9(c)(1)(B) of the Act. Linden pet., p. A23. Finally, the Respondent Unions have argued a third distinct position: that a bargaining order is appropriate in every instance where an employer declines to recognize a union that has presented "convincing evidence of majority support" and that, unless the employer has reasonable grounds for doubting such evidence, he cannot "escape this obligation" by filing a election petition. Union's br., pp. 18, 45.

Linden's principal brief (pp. 13-21) demonstrated that the Court of Appeals' view, apart from other deficiencies, substantially distorts Section 9(c)(1)(B) which permits, but does not require, an employer to file an election petition and also reinstates an "inquiry into the employer's subjective state of mind . . . [and] thus conflicts with *Gissel's* implicit approval of the Board's abandonment of good faith as a standard for defining the duty to bargain."[1] The position of the Respondent Unions is similarly defective. It is predicated on three fundamental misconceptions: (1) that, since "prompt initiation of bargaining is the Act's overriding aim," any policy which would impede prompt employer recognition of a labor organization, as, for example, a counter-campaign lawfully stressing the disadvantages of unionization or the imposition of tactical difficulties in the union's organizational path, is forbidden (see, e.g., Unions' br. at pp. 12, 21, 38-42); (2) that the "election procedure is not qualitatively superior to all the available possibilities" (Unions' br., p. 35); and (3) that, in any event, the issue presented in this case is one that already has been decided by Congress which has "squarely answered that question so as to preclude adoption of the Board's . . . position" (Unions' br., p. 5). None of these arguments, as shown below, have merit.

1. Note, *Union Authorization Cards: Linden's Peacemaking Potential*, 83 Yale L. J. 1689, 1697 (1974).

II.

ARGUMENT

A. The crux of the Unions' position is the belief that "the ultimate aim of the Act . . . is to 'encourage the practice and procedure of collective bargaining.' " Unions' br., p. 12.[2] Such a view can, of course, readily be invoked against any limitation on a union's ability to obtain recognition. If the election process is more time-consuming than requiring recognition based on authorization cards or other secondary idicia of employee sentiment, as it minimally is;[3] or if employees frequently reject

2. There is considerable doubt whether, even if the sole objective of the Act was to encourage collective bargaining, the Unions' position would facilitate achievement of that goal. As Professor Bok has observed, if bargaining orders were limited to cases "involving serious violations" and "in which there is a reasonable probability that the union would have ultimately prevailed in the absence of the employer's unlawful acts," there would be "greater assurance that [the] order would be followed by effective bargaining." Bok, *The Regulation of Campaign Tactics in Representation Elections Under the NLRA*, 78 Harv. L. Rev. 38, 138 (1964). Moreover, to the extent that union coercion or misrepresentation arises in a refusal to bargain proceeding involving authorization cards, the Unions' argument would further discourage bargaining; the card process "delays recognition and bargaining for it contains a built-in bias toward protracted litigation, and fails to protect employee free choice against union coercion as well as an election does." Note, *supra* n. 1, at 1700-1701.

3. In fiscal year 1973, in contested elections where there was a pre-election hearing, the median time between the filing of a

unionization once they become aware of its disadvantages, as also appears to be the case;[4] or if it is time-consuming to permit employers to obtain court review of Board representation case decisions, as is occasionally sought,[5] then in each instance the

petition and the direction of an election was 42 days. *Thirty-Eighth Annual Report of the National Labor Relations Board*, 13 (1973). In stipulated or consent elections, where a pre-election hearing is waived, the elapsed time from the petition filing to the direction of election is usually three to five days and, in either case, an election is then held from 17 to 20 days thereafter. Comment, *Employer Recognition of Unions on the Basis of Authorization Cards: The "Independent Knowledge" Standard*, 39 U. Chi. L. Rev. 314, 325 n. 48 (1972). It is the latter consent route, which does not entail any litigation whatsoever, which is that followed in *over eighty per cent* of the total elections. *Thirty-Eighth Annual Report*, 16. There are many considerations which dictate the consent route—the possibility of "consumer picketing, threats of labor trouble or excessive grievances in affiliated plants, pressure exerted by customers friendly to the Union" (Bok, *supra* n. 2, at 54); the absence of contested issues; the desire to avoid litigation and/or campaign costs; the expectation of a more advantageous collective bargaining agreement; or a general objective of reducing employee discontent and improving production. And, for the same reasons, contrary to the Unions' assumption (pp. 39-42), any post-election proceedings, let alone "protracted litigation," are highly unusual. See note 5, *infra*.

4. See *e.g.*, Doppelt and Ladd, *Gissel Packing Company—The N. L. R. B.* v. *Applies the Standard*, 49 Chi.-Kent L. Rev. 161, 177 (1972) ("It is not all uncommon that a large number of employees sign cards for a union, and then vote against the union after intensive pre-election employer campaigning"); and the other authorities noted at p. 10, n. 11 of Linden's principal brief. Among the reasons for this change of position is the fact that an employee, when he signs an authorization card, "may know very little about the possible disadvantages of unionism, such as initiation fees and special assessments, fines for the violation of union rules, and obligations to walk the picket line in any strike involving the union." Comment, *Refusal-To-Recognize Charges Under Section 8(a)(5) of the NLRA: Card Checks and Employee Free Choice*, 33 U. Chi. L. Rev. 387, 390 (1966).

5. The Unions' attack on the right of employers to appeal representation case issues through the unfair labor practice route to the appellate courts, and the asserted need to eliminate the delay occasioned thereby through either required recognition or a consent election procedure (Unions' br., p. 8, n. 8 and pp. 38-42), disregards, *first*, that Congress mandated precisely such an indirect, time-consuming method of review. See *e.g.*, *Boire* v. *Greyhound Corp.*,

necessity of "encourag[ing] collective bargaining" is raised as a touchstone to nullify such a practice. See Union's br., pp. 12, 19-21, 38-42. The Act is thus viewed as having a single myopic goal: the promotion of unionization.

Whatever the merits of this view under the Wagner Act, either as the singular objective of national labor policy[6] or as the justification for card-based bargaining orders,[7] the Taft-Hartley

376 U. S. 473, 477-78 (1964): ("That this indirect method of obtaining judicial review imposes significant delays upon attempts to challenge the validity of Board orders in certification proceedings is obvious. But it is equally obvious that Congress intended to impose precisely such delays.") *Second*, notwithstanding the availability of this review procedure, it is utilized only infrequently. Employers virtually universally abide by the results of the Board's election processes. Objections are filed in only nine per cent of the cases (*Thirty-Eighth Annual Report*, *supra* n. 3, 277) and further appellate litigation is relatively rare. Of 8,526 representation elections resulting in the certification of a union during fiscal year 1973, judicial orders requiring the commencement of bargaining were issued during the same period in only 147 cases or 1.7 per cent of the elections held. *Id.* at 210, 225. Professor Ross, after a comprehensive study of refusal-to-bargain cases during a five-year period, similarly found that "the overwhelming majority of employers do not violate Section 8(a)(5) . . . *If all employers who delayed compliance until after the entry of a contested court decree eventually signed contracts, there would only have been 47 new bargaining relationships for the five year period.*" Ross, *Analysis of Administrative Process under Taft-Hartley*, 1966 Labor Relations Yearbook, pp. 259, 309-310 (BNA, 1966) (emphasis added).

6. See, *e.g.*, *International Assn. of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 82 (1940), commenting that the Board, in order to dissipate union unfair labor practices, may exercise "discretion involving an expert judgment as to ways and means of protecting *the freedom of choice* guaranteed to the employees of the Act . . . unless the effect of the unfair labor practices is completely dissipated, the employees might still be subject to improper restraints and not have *the complete freedom of choice which the Act contemplates*" (emphasis added).

7. See, *e.g.*, *Franks Bros. Company* v. *N. L. R. B.*, 321 U. S. 702, 704-705 (1944), where this Court upheld a bargaining order since, *inter alia*, to do otherwise would allow employers "to profit from their own wrongful refusal to bargain." See, to the same effect, *Gissel*, 395 U. S. at 610-11. If, as *Franks Bros.* suggests, "the prime value of the remedy resides in its deterrent effect, there is little reason to apply it to conduct that is merely inadvertent. As a general rule,

amendments to the Act "exemplified and encouraged the opposing view."[8] The original concern of the Act, "the lack of effective unions", was altered in 1947 so that "the individual's freedom to refrain from collective action became a dominant theme . . . it is sometimes said that the policy of the statute is no longer to encourage collective bargaining but to protect employees in their freedom of choice as to whether they shall have collective bargaining . . . The central focus [of the Taft-Hartley amendments] was protecting employees' freedom of choice; whether they chose collective bargaining was of little concern".[9] Similarly, the 1959 Landrum-Griffin amendments to the Act imposed "no added commitment to collective bargaining as an instrument of democratic government. On the contrary, those amendments reinforced freedom of choice . . . The dominant attitude of the law and society toward collective bargaining seems to be one

therefore, the order to bargain might well be restricted to cases involving discriminatory discharges or clear threats of retaliation." Bok, *supra*, n. 2, at 138.

8. Cox, *Some Current Problems in Labor Law: An Appraisal*, 35 LRRM, 48, 50 (BNA, 1954) which, in addition to the arguments adduced in support of the various new provisions added to the Act, also notes "the violence of the Taft-Hartley debates [which] seems attributable to labor's understanding of the destructive philosophy [being] introduced into the [Act]" and "the insistence upon repeal [of the amendments which] can be explained . . . by the feeling that only repeal would repudiate the misconception."

9. Summers, *Freedom of Association and Compulsory Unionization in Sweden and The United States: A Comparative Study*, 112 U. Pa. L. Rev. 647, 665-67, 694-95 (1964). Summers observes, for example, the addition of the right of employees to refrain from concerted activities; of employees to decertify unions and revert to individual bargaining; of the increased employee freedom under section 9(a) to process and adjust grievances; and of the new restrictions imposed on secondary boycotts which "curtained the unions' use of economic pressure to achieve representation status." In addition, there was also the elimination of means other than an election to obtain the benefits of certification, the inclusion of the right of employers to file election petitions, the addition of section 8(c) to guarantee employers the right to express their view on unionization and the insertion of section 8(b)(1)(A) to forbid coercive union tactics. See Linden principal br., p. 9.

of neutrality, if not indifference."[10] Indeed, as this Court recently observed in *N. L. R. B.* v. *Savair Manufacturing Co.*, 414 U. S. 270, 94 S. Ct. 495, 499 (1973), "The Act is wholly neutral when it comes to that basic choice."

This desire to encourage freedom of choice has also influenced the post-1947 evolution of bargaining orders. The Board, for example, "has *never* held that presentation of cards from a majority of members of the unit created an absolute duty to bargain."[11] No Board member has ever "suggested going this far since the enactment of the Taft-Hartley amendments in 1947"[12], and an examination of Board card-based bargaining orders for 1965-1968 disclosed *no* instance where a bargaining order issued and there was neither "interference with the election process" or "the rejection of previously agreed upon means to determine the union's majority status".[13] The Unions' view has also been repeatedly rejected by the Board: in *Aaron Brothers*, 158 NLRB 1077 (1966), where the Board emphasized "that an employer no longer needed to come forward with reasons for rejecting a bargaining demand" (*Gissel*, 395 U. S. at 593); in *Gissel*, where the Board reiterated that "an employer can insist that a union go to an election . . . so long as he is not guilty of misconduct . . . he can demand an election with a simple 'no comment' to the union" (*Id.* at 594); and in the recent

10. Summers, *supra* n. 9, at 667, 695, observing that the Landrum-Griffin amendments not only tightened "restrictions on secondary boycotts, but also blunted another economic weapon used by unions to obtain recognitional status—so-called organizational picketing." Significantly, while Section 8(b)(7), added by the Landrum-Griffin amendments, confers upon an employer the option to withstand coercive union picketing and not petition for an election, the lower court's decision totally abrogates that right.

11. Comment, *supra*, n. 3, at 318 (emphasis added), citing the Memorandum from Sec. of Labor Wirtz to Sen. Javits, in *Hearings on S.256 Before the Senate Comm. on Labor and Public Welfare*, 89th Cong., 1st Sess., 19, 20 (1965).

12. Welles, *The Obligation to Bargain On The Basis of A Card Majority*, 3 Ga. L. Rev. 349, 351 (1969).

13. Gordon, *Union Authorization Cards and the Duty to Bargain*, 19 Lab. L. J. 201, 222 (1968).

Steel Fab, 212 NLRB No. 25, 86 LRRM 1474, 1478 (1974), decision which once more declared that "the bargaining order . . . is designed solely as a remedy for serious employer interference with employee rights". As these authorities demonstrate, a remedial bargaining order is not designed to issue absent employer wrongdoing; and refusal to accept secondary indicia of majority support is simply not wrongdoing sufficient to shift the Unions' traditional burden of proving majority support. Obviously, the Unions are not pleased with this post-1947 direction of the Act and seek, by means of this case, to restructure the course of national labor policy. Their forum is, however, misplaced. "[t]his Court is not a super Board authorized to overrule an agency's choice between reasonable constructions of the controlling statute" (*Florida Light and Power Co.* v. *I. B. E. W.*, ___ U. S. ___, 94 S. Ct. 2737, 2750 (1974) (dissenting opinion)).

B. The Unions argue that, notwithstanding Congressional recognition of "the acknowledged superiority of the election process" (*Gissel*, 395 U. S. at 602), that "the election procedure is not qualifiedly superior to all the available possibilities". Unions' br., pp. 34-38. Other knowledgeable observers have repeatedly reached a sharply-different conclusion: for example, that "[i]t cannot be gainsaid that the best and most reliable method of determining the representative status of a union is the election process. . . . The Board has lived by that precept . . .";[14] that "[a]vailable statistics support the hypothesis that card checks are not as reliable a method of determining union support as are Board elections . . . the Board itself has expressed awareness of the shortcomings of card check determination . . . Expressions of doubt as to the reliability of the card check process have also come from . . . Secretary of Labor Willard Wirtz and even the AFL-CIO";[15] and that "[i]t would

14. Former Board Associate General Counsel Gordon in *id.* at 223.

15. Comment, *supra* n. 4, at 390-92 (footnotes omitted), citing former Board Chairman McCulloch's study in Section of Labor Relations Law American Bar Association, 1962 Proceedings, 17;

be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check' . . . No thoughtful person has attributed reliability to such card checks."[16]

An employer is not, of course, precluded from relying on authorization cards to voluntarily grant recognition, and cards may also be utilized where, because of employer misconduct, they constitute the only available means of determining employee sentiment.[17] The value of secondary authorization indicia in such instances does not, however, warrant abandoning the principle of free choice and incurring the risk of imposing a bargaining agent upon what may actually be a nonconsenting majority[18] in other situations. Cards are, to repeat, frequently obtained

Midwest Piping & Supply Co., 63 NLRB 1060, 1070, n. 13 (1945); Wirtz, *supra* n. 11, 19 (1965); and the AFL-CIO 1961 Guide Book for Union Organizers.

16. *N. L. R. B.* v. *S. S. Logan Packing Company*, 386 F. 2d 562, 656 (4th Cir. 1967); and see this Court's recently articulated concern about the fate of employees who refuse to sign authorization cards, in *N. L. R. B.* v. *Savair Manufacturing Co., supra*, 94 S. Ct. at 501.

17. The Unions' reliance (pp. 35-6) on *Sullivan Electric Co.*, 199 NLRB No. 97, 81 LRRM 1313, enf'd 479 F. 2d 1270 (6th Cir. 1973), is misplaced. That case dealt with an entirely different situation not present here—an employer "unilaterally undertak[ing] to determine the Unions' majority or minority status by means of a poll, under conditions of his own choosing" (81 LRRM at 1314). In addition the Sixth Circuit expressly upheld the Board's view in the instant case as "consistent with the leading case law established in *N. L. R. B.* v. *Gissel* . . ." 479 F. 2d at 1272. Linden submits, moreover, that, although not before the Court in this case, the decision in *Sullivan Electric* and similar resurrections of a good faith doubt approach should be rejected since *Gissel* repudiated such an inquiry into an employer's subjective motivation. 395 U. S. at 594; see also Linden's principal brief at 14-16 and n. 16 and the brief *amicus curiae* of The Chamber of Commerce of the United States.

18. Cf., *e.g.*, *International Ladies' Garment Workers* v. *N. L. R. B.*, 366 U. S. 731, 737 (1961) ("there can be no clearer abridgement of Section 7 of the Act, assuring employees the right 'to bargain collectively through representatives of their own choosing' or 'to refrain' from such activity" than to grant "exclusive bargaining status to an agency selected by a minority of employees, thereby impressing that agency on the nonconsenting majority").

under such conditions,[19] and without knowledge of other considerations,[20] so as to render them an unreliable means of ascertaining employee choice and, as already demonstrated (see note 4, *supra*), are a misleading indicator of employee desires.

C. Although the court below found "no clear cut answer . . . either in the text of the statute or the legislative history . . . to the question of when and in what circumstances an employer must take evidence of majority support as convincing" (Linden pet., p. A14), the Unions argue that Congress has "squarely answered" the question here presented "so as to preclude adoption of the Board's . . . position." The instant case, they assert, is thus analogous to *N. L. R. B.* v. *Drivers Local Union No. 639 (Curtis Bros.)*, 362 U. S. 274 (1960), where, by reason of Section 13 of the Act forbidding any restrictions on the right to strike as it existed prior to 1947 unless "specifically provided for" in the Act itself, this Court refused to permit the Board to adopt a restriction that was, unlike the present situation, inconsistent with both pre-1947 decisions and the Board's own interpretations of the law for nearly a decade after the adoption of the Taft-Hartley amendments. Unions' br., pp. 5, 21-24.

Such persuasive Congressional history, sufficient to both negate the repeated indications of a contrary legislative pur-

19. See, *e.g.*, Note, *supra* n. 1, at 1698 (". . . the card drive may acquire a bandwagon effect more readily than an election. There is a danger of threats or promises from the solicitor . . . Physical threats may also be present. The potential for misrepresentation is great . . ."), and Comment, 75 Yale L. J. 806, 825 (1966).

20. Regardless of whether the addition of Section 8(c) to the Act in 1947 is viewed as "merely a rule of evidence" (Unions' br. pp. 19-20), or a broader guaranty to employers of the right to express their views on unionization and thereby create a more informed electorate, this provision clearly militates against the Unions' position. To adopt that view would result "in the anomalous position of denying elections requested by employers on the grounds that the employers desired to engage in action specifically authorized by the statute". Comment, *supra* n. 4, 400, n. 65.

pose (see n. 9, *supra*) and equivalent to the express prohibition of Section 13, is assertedly found in the Congressional conferees refusal to adopt a proposed House amendment which would have required employer recognition of certified unions only. As *Gissel* demonstrates (395 U. S. at 598-600), however, the import of this history and this Court's subsequent decision in *United Mine Workers* v. *Arkansas Oak Flooring*, 351 U. S. 62 (1956),[21] was to permit the continued use of cards for either purposes of voluntary recognition or to support a bargaining order under *Franks Bros.*, 321 U. S. 702 (1944), where employer misconduct precluded a fair election. Indeed, acceptance of the House amendment would have forbidden either of these two routes to recognition. It is a wholly different proposition to urge, conversely, that Congress intended to compel employer recognition on the basis of cards or other secondary indicia of employee support, particularly in view of the frequent expressions of a contrary legislative desire to promote employee free choice.[22]

21. *Mine Workers* did not involve, nor has it ever been read to control, as the Unions propose (br., pp. 25-8), the present situation. That case did not concern or even discuss an employer's obligation to bargain absent the commission of unfair labor practices. Rather, it dealt with a wholly different matter—the right of a state court to enjoin recognitional picketing by an admitted unit majority after submission of that majority's cards to the employer.

22. In addition, the conferees may have "felt the thorough revision of Section 9(c) obviated any need to change Section 8(a)(5). The House Minority Report suggests that the main concern with Section 8(a)(5) was related to the subject of bargaining as distinct from recognition. H. R. Rep. No. 245 at 82". Comment, *supra* n. 19, at 820, n. 103.

III.

CONCLUSION

For the foregoing reasons, as well as those stated in Linden's principal brief, it is respectfully prayed that the decision of the Court of Appeals be reversed and this case be remanded to that Court with instructions to enforce the Board's order in its entirety.

Respectfully submitted,

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